

DEPARTMENT Attorney General - MPCA

STATE OF MINNESOTA

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Office Memorandum

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PRIVILEGED

TO HUBERT H. HUMPHREY, Attorney General
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US EPA RECORDS CENTER REGION 5



515201

SUBJECT

BRIEFING MEMORANDUM ON REILLY TAR'S OFFER OF JUDGMENT

This memorandum is an outline of issues to be discussed regarding the "Offer of Judgment" served by Reilly Tar on all parties to the Reilly litigation.

I. Offers of Judgment Generally

- A. What is an Offer of Judgment under Rule 68, Fed. R. Civ. P.
- B. How does an Offer of Judgment Change the Nature of Settlement Negotiations (i.e., what risks does the State take if it rejects an offer of judgment)

II. Reilly's "Offer of Judgment"

- A. Issue exists as to Whether Reilly's Offer meets requirements of Rule 68 Offers of Judgment; this issue will not be decided unless and until Reilly comes out at trial with a result more favorable than its offer and then brings a motion for costs
- B. Reilly's Offer of Judgment contains three parts:
 - 1. Consent Decree and Exhibit A. (Exhibit A is the Remedial Action Plan (RAP). This set of documents would be executed by all parties and forms the basic agreement between the State and Reilly. The Consent Decree and Exhibit A are described in C., below.
 - 2. Exhibit B. This document is a proposed agreement to be executed by Reilly and the City of St. Louis Park. Through the proposed agreement, the City would assume responsibility for implementing some of the provisions of the Consent Decree and RAP which Reilly otherwise would be required to undertake.
 - 3. Exhibit C. This document is a Stipulated Order for Dismissal With Prejudice to be entered in the Court if a settlement agreement is reached.

C. It is the Consent Decree and RAP which form the basic agreement between the State and the United States and Reilly.

1. Consent Decree is structurally similar to the Consent Orders the MPCA has negotiated in other superfund cases. (The form of the Consent Decree was established more than a year ago during settlement negotiations with Reilly.) The Consent Decree is the superstructure of the settlement -- it describes the basic requirements of the Order and procedural implementation of these requirements (e.g., resolution of disputes, permit requirements, reimbursement requirements, covenant not to sue). The more important issues which exist with respect to the Consent Decree are outlined in Appendix A to this memorandum.
2. Remedial Action Plan (RAP or Exhibit A) is structurally similar to the RAPs which the MPCA has negotiated on other superfund cases. (The form of the RAP was established more than a year ago during settlement negotiations with Reilly.) The RAP is the detailed description of what work must be accomplished at the site to remedy the identified pollution problems. An outline of the major components of the RAP is stated below. Appendix B to this memorandum includes a brief identification of the major RAP issues.

The RAP is divided into the following twelve sections and one appendix:

- a. Definitions
- b. General Provisions
- c. Sampling and Quality Assurance
- d. Drinking water treatment system at SLP 10/15
- e. Mt. Simon-Hinckley Aquifer
- f. Iron-ton-Galesville Aquifer
- g. Prairie du Chien-Jordan
- h. St. Peter Aquifer
- i. Drift-Platteville Aquifer

- j. Leaking multi-aquifer wells
- k. Near-surface contamination
- l. Contingent drinking water treatment
- m. Appendix A: PAH Compounds to be monitored

LRT:lt

cc: Eldon G. Kaul
Assistant Attorney General

APPENDIX A
April 2, 1985 Memorandum

**Consent Decree: Unresolved Issues (Reasons Why MPCA Staff
Recommends Rejecting Consent Decree)**

1. Future Implementation Oversight Costs and Past Costs (Part P);
2. List of Carcinogenic Substances (authority of government to amend list by making additions as new facts are known -- see also RAP, section 2); and,
3. Reilly assignment to St. Louis Park and assurance of performance. [There is no conceptual dispute regarding this provision. The State agrees that, as long as Reilly guarantees performance of the requirements of the Consent Decree, Reilly can enter into a separate agreement with St. Louis Park in which St. Louis Park will assume some of Reilly's responsibilities under the Consent Decree. The issue which remains is whether Reilly's proposed language satisfies our requirement that Reilly guarantee performance of the requirements of the Consent Decree. A separate issue exists for the City of St. Louis Park as to whether Reilly's proposed agreement with it (Exhibit B) is acceptable] (Part O);

APPENDIX B
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RAP: Major Unresolved Issues (Reasons Why MPCA Staff
Recommends Rejecting RAP).

The RAP is divided into twelve sections and one appendix. Each of the major issues associated with these sections and appendix are described below.

1. Definitions

MAJOR ISSUES: Definition of carcinogenic PAH as set out in Part 1.2 and Appendix A

Further, Reilly deleted language which would have allowed the governments to add PAH carcinogens as new information develops. This language used to appear in part 1.2.

2. General Provisions

MAJOR ISSUES:

Sewer Availability Charges. Reilly proposes to make the State responsible for paying all Sewer Availability Charges (SAC) for sewer hook-ups. Current estimates suggest that these costs could be greater than \$ 160,000.

Under section 2.2 (drinking water criteria), the Reilly proposal allows the Commissioner to require that wells exceeding certain criteria be discontinued until such time as criteria are met "at the point at which the water in question is introduced to the water supply distribution system." This raises the issue described below (in section 12.)

3. Sampling and Quality Assurance

MAJOR ISSUES: None

4. Drinking water treatment system at SLP 10/15

MAJOR ISSUES:

This section of the RAP pertains to the design and installation of a Granular Activated Carbon ("GAC")

treatment system which would treat water pumped from SLP 10/15 by removing trace organic contaminants. The treated water would then be pumped into the distribution system for the City's use. Reilly proposes to do the design and implementation of the GAC system.

The governments are geared up to have their own contractor begin to design and install the GAC system. We estimate that GAC can be completed with U.S. superfund monies by next fall. (Dirt will be moved this summer.)

The MPCA staff (and the United States) do not want to hold off on designing and constructing the GAC system pending the outcome of these settlement negotiations. Settlement in this case has begun and ended several times already. Given the governments' present readiness to move forward, the MPCA staff considers Reilly's proposal to design and implement GAC to be unacceptable. Reilly could make its proposal acceptable by:

- a. Agreeing to implement government contractors' design within same time frame as government contractor; or,
- b. Agreeing to reimburse government for its design and to design and implement Reilly's design within same time frame as government contractor would have implemented government design.

5. Mt. Simon-Hinckley Aquifer 1/

MAJOR ISSUES:

Reilly proposes to monitor certain wells and if results exceed specified limits to implement a

1/ There are five aquifers beneath the Reilly site and Hopkins and St. Louis Park. In increasing order of depth, these are: (1) Drift-Platteville; (2) St. Peter; (3) Prairie du Chien/Jordan; (4) Iron-ton-Galesville and (5) Mt. Simon-Hinckley. The governments believe that contamination from Reilly site exists in all five aquifers to varying extent. All aquifers except the Drift-Platteville and Iron-ton-Galesville currently serve as drinking water supplies in St. Louis Park and Hopkins. From the State's perspective, the remedial action plan must be designed to remedy the contamination either through clean up or containment for each of the five aquifers. Sections 5 through 9 of Reilly's proposal relate to these five aquifers.

specified program. The MPCA staff believes that sufficient information exists to support a conclusion that the Mt. Simon-Hinckley is contaminated. Therefore, the State believes that the proper remedy for this aquifer is the design and implementation of a "Remedial Investigation" the purpose of which would be to fully describe the extent and magnitude of the contamination. Once this has been defined, the next appropriate step would be the design and implementation of a remedy (e.g., clean up or containment) for that contamination. However, for purposes of settlement only, the MPCA staff is willing to entertain Reilly's suggestion that remedial action be postponed until further monitoring demonstrates that specific wells ending in the Mt. Simon-Hinckley are contaminated. Although the staff does not intend to be so limited in its prayer for remedy before the Court, the staff would be willing to accept Reilly's proposal regarding this aquifer if (1) all other terms to the Consent Decree are acceptably resolved and (2) section 12.2.1. (the trigger for action in the Mt. Simon-Hinckley) is acceptably modified.

6. Ironton-Galesville Aquifer

MAJOR ISSUES:

This is one of the two aquifers which is not itself used as a drinking water supply. Reilly proposes to "monitor W105" for two years and does not propose to conduct any remedial investigation or action if further monitoring confirms the already well-established fact of contamination. In addition to monitoring W 105, Reilly does suggest (1) one contingent action and (2) a framework within which persons can be reimbursed for incremental costs associated with contamination in the Ironton-Galesville. Regarding the contingent action, Reilly suggests it "if any St. Louis Park or Hopkins municipal drinking water supply well that withdraws water from the Ironton-Galesville aquifer is installed within one mile of the site," Reilly will monitor the well and, if contamination is found, will comply with the requirements of Section 12. As to reimbursement of expenses, Reilly agrees to pay certain incremental costs incurred by persons who are required by MDH, as a condition for a permit to install a new well in St. Louis Park or Hopkins in the Mt. Simon Hinckley, to safeguard against the spread of contamination from the Ironton-Galesville to the Mt. Simon Hinckley.

Reilly's proposed remedy flows from a different philosophical perspective than that held by the State. Reilly seems to believe that the value of clean ground water is restricted to its use as a water supply. The State, as custodian of the natural resources of the State, disagrees with this perspective. The State does not uniformly ignore contamination problems in ground water simply because that ground water is not currently used as a water supply.

The MPCA staff believes that the appropriate remedy for this aquifer is the following: (1) Design and implementation of a remedial investigation to describe the full extent of contamination at this aquifer; (2) Design and implementation of a feasibility study to consider alternative options for remedying the contamination; and, (3) Design and implementation of a selected alternative to remedy the contamination. However, for purposes of settlement only, the State is willing to entertain Reilly's suggestion that remedial action be limited as described. Although the State does not intend to be so limited in its prayer for remedy before the Court, the State would be willing to accept Reilly's proposal regarding this aquifer if (1) all other terms to the Consent Decree are acceptably resolved and (2) section 12.2.1. (the trigger for action in the Iron-ton-Galesville) is acceptably modified.

7. Prairie du Chien-Jordan

MAJOR ISSUES:

Remedial action at this aquifer is somewhat different than for other aquifers. It involves (1) removal of a continuing source of contamination (W 23); (2) containment of contamination through a gradient control system; and, (3) contingent actions in the event additional wells become contaminated.

The major issue here related to the trigger for contingent actions. Reilly's RAP provides that if the gradient control system does not adequately control the existing zone of contamination, the State and the United States may require Reilly to make gradient control system modifications "in order to protect actual or potential uses of the aquifer for drinking water supplies." The MPCA staff considers Reilly's proposal inadequate in not protecting all areas of the aquifer currently uncontaminated.

8. St. Peter Aquifer

MAJOR ISSUES:

The remedial action plan for this aquifer contains two main sections: monitoring requirements and contingent action requirements. As drafted, the monitoring requirements are acceptable to the State, but for the reasons specified above regarding the Prairie du Chien, the contingent action requirements are not acceptable.

9. DRIFT-PLATTEVILLE AQUIFER

MAJOR ISSUES:

There is major contamination in the aquifer resulting from Reilly's activities. Although this aquifer is not a drinking water aquifer in this area, it provides recharge for other aquifers.

Reilly proposes to install a single gradient control well. The well would be located just to the west of a buried bedrock valley which could permit contaminated water to flow to the St. Peter aquifer. In addition, Reilly proposes to install monitoring wells and to sample these and existing wells in order to better define the extent of contamination in the aquifer. As a contingency, Reilly proposes to install additional gradient control wells or to increase the pumping rate at the first well if "monitoring in this area displays Drift or Platteville phenolics or PAH concentrations comparable to those within the capture area of the gradient control wells installed pursuant to" the gradient control requirement for this aquifer. The MPCA staff finds acceptable the portions of the RAP related to the Drift-Platteville proposals except for the contingency section. The MPCA staff's problems with the contingency sections are the following: (1) the staff believes that the installation of additional gradient control wells should not be listed as a "contingency" but is the natural outcome of a remedial investigation and feasibility study (as a practical matter, the difference between listing it as a contingency and not so listing it is to raise unjustified questions as to the likelihood of occurrence) and (2) the staff finds unacceptable the phrase "concentrations comparable to" because existing data on the level of contamination near the site of the proposed gradient control well is inconclusive and if it is very high could result in a too limited trigger for control.

10. LEAKING MULTI-AQUIFER WELLS

MAJOR ISSUES:

These wells allow contamination to flow from contaminated aquifers (especially the Drift-Platteville) into deeper aquifers which would otherwise be protected from contamination. The issue is whether multi-aquifer wells should be closed within the control area of a gradient control system (which would be presumably removing the contamination which enters the aquifer) or whether they should be allowed to continue to be a source of contamination for the deeper aquifers. Reilly proposes the latter; the MPCA staff for the purposes of settlement is willing to entertain Reilly's proposal, but prefers to have the wells properly closed or reconstructed now. At trial, the MPCA staff will seek "closure/reconstruction."

Another issue is the criteria for closing or reconstructing a well. The MPCA staff believes that any well leaking water above drinking water criteria should be fixed. Reilly proposes to limit the Commissioner's actions regarding well reconstruction to wells "which display interaquifer flow of water which exceeds drinking water criteria for PAH or 10 micrograms per liter phenolics that threaten actual or potential uses of the St. Peter aquifer for drinking water supply with respect to [specified criteria.]" For the reasons described earlier, this limitations to "potential uses" of the aquifer for drinking water is unacceptable.

In addition, Reilly's proposal seeks to place the burden of well closure on the owner of the well rather than on Reilly. This also is unacceptable to the MPCA staff.

11. NEAR-SURFACE CONTAMINATION

MAJOR ISSUES: None.

12. CONTINGENT DRINKING WATER TREATMENT

MAJOR ISSUES:

This section relates back to several earlier sections in that it establishes the requirements for action where monitoring demonstrates contamination at certain trigger levels. ~~The only major issue in this section~~

is the statement in 12.2.1 (applicability) that section 12 "shall apply if monitoring of active municipal drinking water supply wells in the Mt. Simon-Hinckley, Ironton-Galesville, Prairie du Chien-Jordan, or St. Peter aquifers, . . . , indicates that untreated water from any such well exceeds the drinking water criteria for PAH at the point at which the water is introduced to the water distribution system." The MPCA staff's problem with the applicability statement is that the phrase "at the point at which the water is introduced to the water distribution system" could be interpreted as providing for assessment of the quality of the water (and the contaminants in the water) after it has been diluted with water from uncontaminated wells located at the same site. The MPCA staff believes that the trigger for treatment should be tied to the concentrations of contaminants in the contaminated water before dilution.

13. APPENDIX A: PAH COMPOUNDS TO BE MONITORED

MAJOR ISSUES:

There may be an issue as to whether fluoranthene should be listed as a "Carcinogenic PAH" rather than as an "Other PAH." Reilly lists it as the latter; recent studies appear to indicate that it should be listed as the former.